In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-698

EDWARD F. DIXON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole question raised is whether petitioner is entitled to specific enforcement of an alleged plea bargain. The court of appeals affirmed the judgment of the district court, which found that there was in fact no plea bargain, subject to petitioner's right, by prompt application to the district court, to have his plea and sentence vacated and to stand trial (Pet. App. B-1—B-6.

Petitioner was charged in eight counts of a twenty-eight count indictment[1] with attempted income tax evasion, in violation of 26 U.S.C. 7201, and the filing of false income tax returns, in violation of 26 U.S.C. 7206(1). On November 5, 1973, petitioner withdrew his not guilty

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[1]The remaining counts of the indictment pertained to petitioner's cousin, John L. Dixon, and brother, John P. Dixon.

plea and entered a plea of *nolo contendere* to one count of attempted evasion of the payment of corporate taxes for the taxable year ending September 30, 1969. (R. Tab. 3, pp. 3-9). On January 4, 1974, the district court sentenced petitioner to one year's imprisonment, pursuant to 18 U.S.C. 4208(a)(2), and a fine of $10,000 (R. Tab 5, p. 16). On February 19, 1974, the district court resentenced petitioner to a term of nine months' imprisonment and a fine of $10,000 (R. Tab 17, p. 6). Two days later, the district court denied petitioner's motion for reconsideration of sentence and for specific performance of an alleged plea bargain (Pet. App. A-1; R. Tab 17, p. 5). The court of appeals affirmed, subject to petitioner's right, on prompt application to the district court, to withdraw his plea and stand trial (Pet. App. B-6). Petitioner has not availed himself of this remedy.

Although petitioner's argument here is grounded upon the factual assertion that a plea bargain had been concluded between his attorney and the prosecutor, his assertions are disproved by the record. Following a hearing on petitioner's claim, the district court concluded that there was a complete misunderstanding between the parties and that no agreement had in fact been reached. The court stated (Pet. App. A-1—A-2):

> The recorded facts are as follows: On November 5, 1973 the Court entertained a plea of *nolo contendere* wherein the defendant was charged with filing a false and fraudulent corporate income tax return. Fed. R. Crim. P. 11 was fully satisfied before the Court accepted the defendant's plea. During the course of the Court's interrogation of the defendant, his counsel indicated that a "plea bargain" had been effected and

> respective counsel would by letter clearly define the terms thereof. Thus the seeds of this litigation were planted. Counsel sharply disagreed on one segment of the alleged "plea bargain" and that was the exact recommendation the prosecutor would make to the Court regarding a prison sentence for the defendant. To resolve this issue the Court directed that an evidentiary hearing be held. The testimony elicited during this hearing failed to effectively demonstrate the conclusiveness of an accomplished "plea bargain." Government's counsel, who was present during the negotiations that preceded the "plea bargain", stated that the government had agreed that it would make no recommendation whatsoever concerning a jail sentence. On the other hand, defense counsel categorically stated that the government had agreed, as part of the "plea bargain", that it would make an affirmative recommendation of no term of imprisonment. We have no reason to disbelieve or dispute the testimony of any of the more than reputable and credible witnesses who appeared in support of their respective positions.

Since no plea bargain was ever made, it would, as the district court stated, "not only [be] improper, but impossible to specifically enforce the terms of a disputed or controversial 'plea bargain' when the facts do not warrant a determination of a completed 'plea bargain'" (R. Tab 17, p. 3). Despite the finding that no plea bargain was made, the district court recognized that petitioner may have erroneously believed he had a bargain. It therefore offered petitioner the opportunity to withdraw his plea, but he rejected this offer (Pet.

App. A-2—A-3). Similarly, in affirming the district court's factual determination that no agreement was ever reached between the parties, the court of appeals renewed the district court's offer to petitioner of the option of withdrawing his plea and standing trial[2] (Pet. App. B-3—B-6). This offer has not been accepted.

In light of the above, there is no occasion for this Court to review the factual finding of the district court, which the court of appeals characterized as "adequately supported by the evidence" (Pet. App. B-5), that no plea bargain agreement was reached between the parties.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

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[2]The court of appeals also instructed the district court that, upon motion of the petitioner, it should issue an order excluding from consideration by the jury all incriminatory information which petitioner had revealed to the grand jury and to the Internal Revenue Service in the mistaken belief that a plea bargain had been concluded (Pet. App. B-6).

[3]Petitioner's reliance on *Santobello* v. *New York*, 404 U.S. 257, and similar cases is misplaced. In those cases, the courts found that there had in fact been a plea bargain that had been breached by the prosecution.